No. 83-271

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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether an agreement among universities to establish television packages for football may be held unlawful per se, despite the existence of procompetitive features, because it reduces the number of different games shown on television.

2. Whether in order to avoid application of the per se rule the defendant in an antitrust case must prove not only the existence and extent of procompetitive benefits but also the "necessity" of the contractual arrangements.

3. Whether college football television programming on Saturday afternoons is a separate market for antitrust purposes.

4. Whether a process of competitive bidding ending in the letting of contracts for the telecasting of college football must be treated as a suppression of competition because, once the contracts have been signed, there is no further rivalry game-by-game for broadcast rights.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 707 F. 2d 1147. The opinion of the district court (Pet. App. 41a-133a) is reported at 546 F. Supp. 1276.

JURISDICTION

The judgment of the court of appeals (Pet. App. 137a) was entered on May 12, 1983. The court of appeals' order denying a petition for rehearing and suggestion of rehearing en banc (Pet. App. 139a) was entered on June 23, 1983. The petition for a writ of certiorari was filed on August 13, 1983, and was granted on October 17, 1983. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal . . ."

STATEMENT

1. The NCAA establishes rules for the conduct of intercollegiate sports among its members. It was founded near the turn of the century in response to public outcry about the increasing violence, injury, and professionalism in college football. It is an unincorporated association of some 785 public and private colleges and universities, together with more than 100 athletic conferences and other organizations (Pet. App. B, 42a). The member colleges and universities collectively deliberate and adopt the rules, for a wide variety of sports, at annual conventions.

The NCAA's football policies run the gamut from the rules of play and basic prohibitions of payment to student-athletes (which would violate the amateurism policy) to the most sophisticated controls on the recruiting and academic eligibility of student-athletes, the size of coaching staffs, the times of practice, the number of games that may be played, and the telecasting of regular season games. This case involves the telecasting rules.

A bylaw, a Television Plan, and the contracts between the NCAA and three television networks (ABC, CBS, and Turner), govern the live televising of football games of the NCAA's members (A. 35-125, 221-22). Under the Plan and contracts, ABC and CBS each present 14 "exposures" of football every fall (an exposure is a time slot on the network, and the network may show a national game or multiple "regional" games in the slot), and the Turner "superstation" cable TV network presents 19 evening games.

Although the Plan and contracts create telecasting opportunities, they also restrict the time and manner in which universities may telecast their games. The limits take several forms. First, only a designated number of games are shown on network telecasts (A. 41-44). Second, there are limits on the number of times any university may appear on national (or regional) telecasts in a two-year period, and the networks have corresponding obligations to show a minimum number of different teams (A. 52-54). Third, there are practical limits, given the existence of the contracts, on the ability of any university to hold out for payments higher than those made to other schools for games that are telecast. Fourth, the Plan authorizes only limited "exception" telecasts that might compete with the networks or other live games. Major colleges generally may telecast their games outside the network contracts only if they are sold out or are more than 400 miles from the visiting teams' campuses, and the telecasts would not interfere with attendance at any other game that is not sold out. There are other exceptions for less prominent football programs, including those that have not recently been on network television. Telecasts of post-season bowl games also are outside the scope of the TV Plan and contracts. The exceptions are described at A. 62-67, 151-56.

Plans with similar features have been in place since 1951 (A. 241, 279, 281-83, 336-38). The plans for 1951-53 were submitted to the Antitrust Division of the Department of Justice for review (A. 283-86, 297-302; Defendant's Exhibit B-4, at 36-37). Since that time the NCAA has refined but not altered the basic principles of the plans: network packages with limited appearances by each university on the network and limited exception telecasts. The number of annual network exposures has increased from 12 in 1952 to 47 or more under the contracts now in force (A. 154). The number of network appearances per school has increased from one per year in 1952 to six over any two-year period today (A. 54, 154). The number of networks has increased from one in 1952 to three (ABC, CBS,

and Turner) today. The number of different games shown has increased from 12 in 1952 to 228 in 1982: 106 on the networks and 122 under the exception rules (A. 41-44, 244).

2. Respondents sought injunctive relief from the limits on telecasting contained in the Television Plan and network contracts (A. 1-15). They argued that the Plan and contracts violate the antitrust laws because, among other things, the networks' practice of offering equal payments for every game telecast nationally or regionally was price fixing; the NCAA members' refusal to telecast games other than in accordance with the Plan and contracts and the threat implicit in the NCAA's rules, but never carried out, to expel members that violated the television plan, were boycotts; the NCAA's large role in college football telecasting was monopolization; and at all events the Plan and contracts were unreasonable.

3. After a bench trial the district court agreed with respondents on all issues (Pet. App. 41a-133a). The Plan and contracts are price fixing, the court held, because the contracts specify an aggregate amount of compensation which the networks divide among appearing teams; thus teams receive similar prices even though some games may be more attractive than others. The prices are not what would prevail if games were sold one at a time, the court reasoned, and thus are "fixed" unlawfully (e.g., *id.* at 59a-61a, 64a, 87a). Similarly, the Plan and contracts are unlawful per se as boycotts because the NCAA's members agree not to deal with broadcasters other than through the Plan and contracts, and the NCAA's members agree not to televise games with other members which would violate the Plan (*id.* at 100a-104a).

The district court also held the Plan and contracts unlawful as monopolization under section 2 of the Sherman Act because, in the court's view, the relevant market is college football telecast on Saturday afternoons in the fall, and the NCAA has always controlled this market and imposed unreasonable con-

trols (Pet. App. 105a-125a). For similar reasons, the court held the Plan and contracts a violation of section 1 under the Rule of Reason (*ibid.*).

The injunction entered by the district court declared the Plan and 1982-85 contracts void and barred the NCAA and its officers from making any "other contract of similar kind or nature in the future" (Pet. App. 136a). It also prohibited the NCAA and its officers from interfering with members' sale of television rights or requiring any college to relinquish control of television rights as a condition of membership (*ibid.*).

4. The court of appeals affirmed, but on significantly different grounds (Pet. App. 1a-27a). It rejected the boycott holding (*id.* at 22a-25a), it concluded that the influence of the contract on the allocation of payments among teams is not price fixing if the contract is lawful (*id.* at 7a & n.5, 12a & n.11), and it declined to review the monopolization holding, stating that the holding did not affect the relief (*id.* at 20a n.16). It concluded, however, that the Plan and contracts violate the antitrust laws because they reduce the number of different games shown on television. Universities that would like to contract outside the network arrangements often cannot do so. The court of appeals concluded that this is a reduction of output, unlawful per se (*id.* at 8a-15a).[1]

The court of appeals acknowledged that the NCAA advanced procompetitive justifications for the Plan and contracts. The court of appeals rejected the justifications for two reasons.

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[1] The NCAA argued that respondents, as members of the NCAA seeking a larger market share but endorsing most of the NCAA's controls, do not suffer antitrust injury. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 144-46 (1968) (White, J., concurring); *Schoenkopf* v. *Brown & Williamson Tabacco Co.*, 637 F. 2d 205, 211 (3d Cir. 1980). The court of appeals rejected this contention (Pet. App. 3a-6a). Although we disagree with this holding, we have not presented it as a separate question for review by this Court.

First, it placed on the NCAA "the burden of proving the effectiveness and necessity" of the Plan and the contracts in producing the procompetitive benefits asserted for it (Pet. App. 11a & n.9, 15a). Second, given this allocation of burdens, the court of appeals thought that the NCAA had fallen short: the procompetitive benefits were not so overwhelmingly plain that the reduction in the number of games shown could be excused. It called one effect "not unambiguously procompetitive" (*id.* at 10a), characterized the gains of another as "speculative" (*ibid.*), said that a third could be achieved by "less restrictive means" (*id.* at 11a), and disregarded a fourth altogether (*id.* at 12a-14a). Respondents had argued that the justifications should be rejected for a third reason: nonexistence. The court of appeals did not take this third ground.[2]

The court of appeals went on to record its views on other questions. The court dealt with the Rule of Reason by concluding, first, that the appropriate market is college football shown on Saturday afternoons in the fall (Pet. App. 16a-19a), in which the NCAA possesses a very large share. With market power thus established, the court of appeals held that the Plan and contracts are unreasonable restraints, largely because, once they are signed, there is no further competition among networks for the telecasting of individual games or among schools for rights fees, although the schools compete vigorously for network appearances. The court also expressed concern that the

[2] The NCAA argued in the court of appeals that many of the district court's findings and inferences concerning the procompetitive benefits were clearly erroneous. These arguments were based in part on objections to the allocation of burdens and in part on flaws in the district court's use of economic analysis. The court of appeals rejected the NCAA's arguments on burdens, but it evidently was uncomfortable with the district court's inferences. The court's approach—to assume the existence of competitive benefits but hold them insufficient as a matter of law—allowed it to avoid passing on the factual disputes. See also pages 17-19, 27-33, *infra*.

sale of rights to many games in three network packages creates "vertical foreclosure," reducing participation by smaller networks and TV stations (*id.* at 4a, 14a-17a).

Although it found a violation, the court of appeals concluded that the district court had erred in designing relief. The injunction swept too broadly (Pet. App. 25a-27a), improperly banning the NCAA from taking any role in telecasting. The court thought that the NCAA could limit televising of a college's games as a sanction for violations of other rules, could prohibit telecasting on Friday nights (when high schools play), and could formulate other "less restrictive" plans, including pass-over payments and arrangments that did not entail assertion of exclusive rights to telecasting (*id.* at 21a, 26a-27a). It stated that although "the NCAA cannot lawfully maintain exclusive control of the [telecasting] rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case" (*id.* at 27a). The court did not vacate the injunction, however, but rather affirmed and remanded to the district court to reconsider in light of the views expressed in the opinion (Pet. App. 27a; Pet. App. 137a).[3] This left the injunction in effect, and respondents say that under the court of appeals' disposition the district court properly may order the NCAA "out of the television football business altogether." Response to NCAA's Application for Stay, dated July 19, at 8.

Judge Barrett dissented (Pet. App. 28a-40a). He agreed with the NCAA on every point in dispute and also concluded

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[3] The NCAA believes that this approach is unwarranted. Under controlling cases, including *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), and *Schmidt* v. *Lessard*, 414 U. S. 473 (1974), an appellate court is required to vacate a vague, overbroad, and unjustified decree, not just to affirm and give advice to the district court. Nonetheless, we have not presented the remedial issues for separate consideration here. Cf. page 33, n.18, *infra*.

that because of the amateur and educational nature of college football, the application of the ordinary approach to antitrust analysis is unwarranted. In particular, Judge Barrett concluded that "the district court failed to adequately focus on the procompetitive features of the NCAA television plan-contracts" (*id.* at 33a), that the Plan and contracts "on balance, promote competition and enhance viewership" (*id.* at 38a), and that the NCAA is "a form of joint venture, and its television plan and contracts are an integral, all-important aspect of its purposes and goals" (*id.* at 39a).

In light of the substantial continuing effects of the injunction and the probability that the NCAA would be successful in obtaining relief from this Court, Justice White issued a stay on July 21, 1983 (Pet. App. 141a-44a).

SUMMARY OF ARGUMENT

The NCAA is a joint venture. Its member colleges' athletic programs are integrated in large part. Such integration is inevitable and beneficial in any sports league. Games are made by the league—by the collectivity of teams—rather than by individual colleges. The cooperative aspects of the NCAA's arrangements enable the NCAA and its members to produce, at lower cost, football games that will be more attractive to viewers and thus more successful in competition with other forms of live and televised entertainment.

Our arguments on the question whether the television arrangements should be characterized as unlawful per se appear in Parts I, II, and III below, while the arguments pertaining to assessment under the Rule of Reason appear in Parts III and IV.

The argument in Part III concerns the question whether the NCAA has market power. It is pertinent to both the per se and the Rule of Reason analysis because most of our arguments about the competitive benefits of the arrangements—the usual foundation for the Rule of Reason rather than per se ana-

lysis—start from the premise that the NCAA is in fact competing against other forms of entertainment. If, as the Tenth Circuit thought, the NCAA's members are not competing against anyone but have cornered the relevant market, the things we characterize as procompetitive features may appear to lack that quality. An understanding of the nature of competition in television thus is an important ingredient in our arguments about competitive benefits. At the same time, however, the nature of the benefits (Part I), and the allocation of the burden of persuasion (Part II), are essential ingredients in the assessment of market power. It is therefore necessary to weave together in the legal assessment what may appear to be disparate strands of argument.

I

The per se rule applies to naked restraints, not cooperative production. When cooperation among co-venturers reduces the costs of production and increases the potential for competition against other economic units, per se condemnation is inappropriate.

The NCAA is not a cartel; it is a joint venture. Cooperation is inevitable in team sports, and the arrangements challenged here make the sport more attractive to spectators and those who watch on TV. Thus they increase competition and output.

One way in which they do this is by spreading TV exposures, which helps more schools to attract good players and thus make more games more exciting on the playing field. This in turn makes them more attractive to viewers in the stands and on TV, a competitive benefit.

A second effect of the arrangements is that the networks can both promote NCAA football as a series (promotion increases competition against other entertainments) and select games at the last minute, so that they will be relatively more attractive than games picked at the beginning of the year,

before the playing strengths and records of the teams are established. The establishment of college football as a network series, rather than a string of local broadcasts, also increases the quality of the camera and broadcast crews covering the games, again making them more competitive against other entertainment.

A third competitive benefit is that, by altering which teams appear on TV in which areas, the arrangements can increase live attendance at games while allowing as many hours of football as possible to be broadcast. The increase in live attendance, recognized by Congress, is both an increase in one form of output and of aid in making the televised games exciting to promote viewership on TV.

II

The court of appeals erred in requiring the NCAA to prove both the quantum of these benefits and the "necessity" of the arrangements in creating them. Case-by-case scrutiny of the benefits of given arrangements is not the per se rule at all, but rather is a bobtailed version of the Rule of Reason. It is defective because it permits condemnation of practices that have neither been placed in the regular per se category of almost-always-deleterious acts nor subjected to the full scrutiny of competitive effects under the Rule of Reason.

Requiring proof of the "necessity" of the arrangements is foreign to this Court's antitrust cases. No one can prove that *any* economic arrangement is necessary in the literal sense, and thus the Tenth Circuit's approach either sends parties off on a hopeless quest or opens the door to standardless judicial assessments of the wisdom of competitive practices.

The choice between per se and Rule of Reason analysis is made by *category* of restraint, not case by case with the defendant under a burden that can never be discharged. The category of restraint at issue here is not so overwhelmingly likely to be anticompetitive that the per se rule is appropriate.

III

The NCAA lacks market power. Although the NCAA makes almost all "college football televised on Saturday afternoons in the fall"—the lower courts' definition of the market—it possesses no power over price. The people who watch the televised games do not buy the games, and thus the fact that they may be addicted to football is unimportant. The pertinent economic transaction is that advertisers buy viewers, and the advertisers do not care what programming attracts the viewers who watch the ads. The NCAA cannot charge advertisers extra, because only a minuscule fraction of network ads appear on NCAA football. The advertisers have perfect substitutes for the viewers who watch college football.

All of the usual indicia of competition are present in the television market. The NCAA receives less than 5% of the network ads of even the heaviest advertisers on its programs. These advertisers have many substitutes. The price of ads on college football has gone up and down with the price of other ads on TV, thus establishing that all ads are substitutes for one another. The price of advertising time on college football has remained constant (relative to other ads) as the NCAA has increased the number of games, and thus the number of ads, shown. This means that the NCAA is a price-taker in a competitive market rather than a cartel with the power to affect price.

In the television market, only an increase in the number of viewers, or the assembly of viewers with attractive demographic characteristics, will enable a producer of a television series to increase price. The high price paid for ads on NCAA football thus shows an expansion of output, success in competition against other programs for viewers, rather than, as the courts below thought, the presence of monopoly power. The Tenth Circuit has turned the NCAA's success in competition against it.

IV

Even if the NCAA has market power, the arrangements are not unlawful under the Rule of Reason. They are the result of competition among networks for television rights. The Tenth Circuit erred in thinking that television contracts extinguish competition. The process of negotiation for contracts *is* competition, and it assures that the NCAA will produce the set of arrangements that consumers value most highly. Antitrust does not require every market to be modeled after an auction house, in which one game after another is put on the block. Many markets are most competitive when products are sold in packages, as the NCAA sells seasons of games. The producers of other television shows also sell their products by the season, rather than episode-by-episode. The packaging of these games is the most competitive way to organize this market.

ARGUMENT

I. THE RULE OF REASON APPLIES TO THESE ARRANGEMENTS BECAUSE THEY HAVE THE POTENTIAL TO INCREASE COMPETITION AGAINST OTHER ENTERTAINMENTS

A. The Per Se Rule does not Apply to Cooperation in the Nature of a Joint Venture

The per se rule in antitrust applies to naked agreements, not to cooperation among people who produce a product and share the risks of their enterprise. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10, 19-20 (1979); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 355-57 (1982). The distinction between naked restraints and cooperative production is the foundation of our position.

The court of appeals, on the other hand, applied the per se rule because the Television Plan and contracts entail cooperation among teams that are rivals on the field and *could* be more rivalrous in selling to TV as well. We submit that an approach focusing on a potential for additional rivalry makes a fundamental error.

Ventures that entail some cooperation between people who would otherwise be rivals are common features of economic life. A partnership that produces two or more television series may insist that the actors in each series not organize their own shows, or use any series' characters, in a way that would compete with any of the producer's works. The partners may confine each actor to a single show. These restraints help the producer to create products that are more successful against shows produced by others. Similarly, any large firm may coordinate the activities of thousands of people who could compete. It is not inevitable that Chevrolet, Buick, and Pontiac are parts of General Motors rather than competitors. In any economic organization there will be some span of activities over which competition is suppressed, so that the organization can compete against other economic organizations. The suppression of competition inside such organizations is beneficial to society precisely because cooperation makes it possible for firms to compete.

The potential competitive benefits of what looks at first instance to be the elimination of competition are the foundation for the Rule of Reason. As the Court recognized in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918), all agreements suppress some competition. If the perspective is sufficiently myopic, any agreement will appear to be "pure restraint." Suppression of some subsequent competition is the very purpose of contracts. This poses rather than answers the hard question for antitrust. The answers will depend, as *Broadcast Music* makes clear, on whether the agreement in question carries with it a potential to increase as well as suppress competition. If it does, the more discriminating Rule of Reason inquiry is called for.

The question is one of characterization, which the Court has addressed many times in recent years.[4] E.g., *Continental*

[4] Two other cases before the Court also involve characterization issues related to this case. *Monsanto Co.* v. *Spray Rite Service Co.*, No. 82-914, cert. granted, Feb. 28, 1983, to review 684 F. 2d 1226

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T.V., Inc. v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978); *Broadcast Music, supra; Maricopa, supra.* The principle expressed in those cases is that the restrictive aspects of ventures that are generally procompetitive are subject to scrutiny under the Rule of Reason. The cases ask whether the arrangements in question could help one group or economic unit to compete successfully against others. Only if a court first concludes that a given agreement is very unlikely to have competitive benefits will it characterize that agreement as unlawful per se.

The Court has emphasized, for example, the importance of promoting interbrand competition. *Continental T.V., supra.* It emphasized in *Broadcast Music* how a cooperative arrangement could create a desirable product (readily-available music at costs lower than those of individual contracting). The appropriate question from a competitive perspective is whether the arrangements hold out a substantial potential to create *by competition* the economic efficiency that the antitrust laws were designed to promote.[5] If a practice potentially aids competition against other units, then the activities cannot be unlawful per se, and only the strongest evidence should be allowed to support condemnation under the Rule of Reason.

We submit that the Television Plan and contracts aid the NCAA and its members in competing against other purveyors

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(7th Cir. 1982) (decision applying the per se rule to manufacturer's termination of a distributor; characterization issue concerning the definition of price fixing); *Jefferson Parish Hospital District No. 2* v. *Hyde*, No. 82-1031, cert. granted, Mar. 7, 1983, to review 686 F. 2d 286 (5th Cir. 1982) (characterization issue concerning application of per se rule to cooperation of hospital and anesthesiology group in provision of medical services).

[5] We do *not* argue that an arrangement is lawful whenever it is "beneficial" in some abstract sense, or even whenever it increases economic efficiency. The Court rejected such arguments in *Engineers* and *Maricopa*. Our argument is that the NCAA's arrangements *increase competition* and *thereby* increase efficiency. The competition in question, as we emphasize, is competition for viewers (and hence advertisers) on TV, and for viewers in stadiums.

of entertainment. As a logical matter, we should start with an assessment of the market. Many practices are ambiguous; they may assist in competition if employed by one with a small market share, even though they offer no such benefits if employed by dominant aggregations. See pages 33-36, *infra*. Thus characterization may depend on knowing who are the venture's rivals. We return to this issue in Part III below. For now we emphasize the procompetitive nature of the justifications offered in support of the TV Plan and contracts.

B. The NCAA's Arrangements Increase Competition

1. The TV Plan is a Form of Contractual Integration

The NCAA's TV Plan and contracts are part of a joint venture among many of the nation's universities to create a product—high-quality college football—and offer that product in a way attractive to both fans in the stadiums and viewers on TV. The cooperation in producing the product makes it more competitive against other TV (and live) attractions.

The court of appeals conceded that the NCAA is a lawful joint venture, that most of the rules governing play, recruiting, amateurism, and so on, are lawful, and that there are plausible procompetitive justifications for the Television Plan itself. Pet. App. 6a-14a. This should be enough to preclude application of the per se rule. This Court has held repeatedly that the per se rule is confined to naked restraints and does not apply to mergers, joint ventures, and other forms of cooperative activity, despite the fact that any joint activity has a potential for anticompetitive consequences. E.g., *Chicago Board of Trade, supra; Broadcast Music, supra,* 441 U. S. at 9-10, 19-22; *Maricopa, supra,* 457 U. S. at 356-57 (1982) (agreement among otherwise-competing physicians to offer complete medical coverage for a fixed fee would be "perfectly proper"). Decisions in many lower courts take the same approach.[6]

[6] These decisions apply the Rule of Reason to joint ventures with limits on competition much more sweeping than the TV Plan and

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In the sort of cartel arrangement condemned by the per se rule, the conspirators get together and agree on price or territories. The agreement ends competition but adds nothing. The conspirators do not assist each other in production; they assume no joint risks; they coordinate nothing. E.g., *Maricopa*.

The TV Plan and contracts are a far cry from such naked restraints. The members of the NCAA cooperate in creating the product from the very start. The NCAA's rules of play and

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contracts. E.g., *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F. 2d 1030, 1050-55 (9th Cir.), cert. denied, 104 S. Ct. 156 (1983) (to ban a joint venture just because it has market splitting devices would be the sort of literalism condemned in *Broadcast Music*). Similarly, a large number of cases apply the Rule of Reason to amateur and professional sports, recognizing that organized sports have beneficial, output-enhancing features, and that it is therefore inappropriate to isolate particular aspects of a sports league for per se condemnation. E.g., *Brenner* v. *World Boxing Council*, 675 F. 2d 445, 454 (2d Cir. 1982) ("courts have been reluctant to subject the cooperative activities of sports organizations to application of the group boycott per se rule") (collecting cases); *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F. 2d 813, 821-14 (9th Cir.), cert. denied, 456 U. S. 1011 (1982) (temporal market allocation by horizontal competitors not unlawful per se); *North American Soccer League* v. *NFL*, 670 F. 2d 1249 (2d Cir.), cert. denied, 103 S. Ct. 499 (1982) (agreement among NFL owners not to participate in other sports ventures must be judged by Rule of Reason); *U. S. Trotting Ass'n* v. *Chicago Downs Ass'n*, 665 F. 2d 781 (7th Cir. 1981) (en banc) (cooperation among rivals in identifying horses' records, and agreement not to race horses under some circumstances, must be judged by Rule of Reason and is lawful); *Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n, Inc.*, 665 F. 2d 222 (8th Cir. 1981); *Hennessey* v. *NCAA*, 564 F. 2d 1136, 1151-54 (5th Cir. 1975) (agreements among NCAA universities must be judged by Rule of Reason); *Neeld* v. *National Hockey League*, 544 F. 2d 1297, 1298-1300 (9th Cir. 1979); *Warner-Amex Cable Communications, Inc.* v. *ABC*, 499 F. Supp. 537, 544-46 (S. D. Ohio 1980) (NCAA's TV Plan and contracts must be judged under Rule of Reason); *Justice* v. *NCAA*, No. 83-522 TUC ACM (D. Ariz. Nov. 17, 1983), slip op. 40-49 (applying Rule of Reason to NCAA's activities; collecting cases).

its rules of competition (such as the number of games, the size of squad, and so on) help to define the product to be made. The NCAA's TV rules create a product (a TV series) furnished to the networks. Each game is a result of cooperation, and the TV series itself a result of extended cooperation. The NCAA's members share the benefits of success and the risks of failure in this common adventure. The NCAA can be thought of as a form of partial, contractual integration, much like a pro sports league. The teams are rivals on the field and have separate "owners" (universities here, entrepreneurs in pro sports), but they cooperate to create the TV series sold to advertisers. Cooperation creates new competition, as we describe below.

2. The Posture of the Case Permits the Court to Consider the Benefits of the TV Plan and Contracts

Respondents have argued that whatever role competitive benefits have in theory, they have none in this case because the district court found against the NCAA on all disputed issues of fact. Both the premise and the conclusion of this argument are incorrect.

Neither the district court nor the court of appeals found that the TV Plan did not produce the benefits we describe in the pages that follow. Each, rather, concluded that whatever benefits were obtainable could be achieved by less restrictive means. For example, with respect to the benefits of the arrangements in making games more hotly contested on the field (and thus watched by more people), the district court said only (a) that the witnesses had not offered a persuasive explanation why the NCAA had to be an exclusive seller for this to occur, and (b) that other, less restrictive methods also could produce balanced games. Pet. App. 70a-71a, 96a-98a, 109a.[7] The court of appeals took the same position, relying on

[7] "It is clear that the NCAA restraints are much more far-reaching than necessary to achieve competitive balance. Moreover,

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the district court's findings. Pet. App. 10a-15a, 21a-22a. The district court and court of appeals took a similar approach to the NCAA's other arguments about procompetitive benefits.[8]

To the extent that either court found the facts adversely to the NCAA, the findings were infected by the placement of the burdens of proof and persuasion on the NCAA. On many issues the NCAA offered the only evidence before the court. The district court rejected the evidence and thus ruled for respondents.[9] Because there was no evidence supporting re-

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the Court concludes that whatever marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy." Pet. App. 109a.

[8] With respect to the utility of the TV Plan and contracts in creating a recognized TV series, facilitating advertising, or promoting competition along similar lines, see Pet. App. 12a-14a (court of appeals holds these justifications "potentially procompetitive"; rather than finding the facts insufficient, court states that justifications must be disregarded because of other considerations), *id.* at 90a-91a (district court rejects these justifications because controls are not "necessary" to yield a series).

With respect to the effects of the Plan and contracts in increasing live attendance, see Pet. App. 10a (court of appeals states that "the record contains some evidence that supports the conclusion the plan enhances live viewership" but concludes that this evidence is too "speculative," chiefly because it does not permit a direct comparison between the increase in live attendance and any reduction in TV viewership); *id.* at 68a-70a (district court finds two empirical studies, each showing effects of TV on attendance, "fallible" and then, without citing evidence for a conclusion of no effect, holds that the Plan permits so much TV broadcasting that preventing adverse effects on attendance could not be its purpose).

[9] The live attendance dispute is a case in point. The only evidence about the effects of TV on live attendance was contained in the studies of the National Opinion Research Center from the 1950s (A. 271-73, 287-91, 326-29, 331-36, 340-46, 349-50, 352-54, 356-59) and a new study by Dr. William M. Landes (A. 178-81, 195-213). Each study showed that increased telecasting reduced live attendance.

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spondents' view, the district court's approach was permissible only if the NCAA had the burden of proof. With a different allocation of burdens, it should have ruled for the NCAA. The district court applied its allocation of burdens to all of its findings; it did not make one set of findings under the per se rule and another for Rule of Reason purposes.

Finally, the NCAA argued in the Tenth Circuit that many of the district court's findings and inferences were clearly erroneous. The court of appeals did not reach these arguments, apparently because it concluded that any errors were irrelevant—for reasons stemming from its treatment of both the structure of per se analysis and its assignment of the burden. We argue *infra* that the Tenth Circuit erred as a matter of law in its assessment of what matters and what doesn't in deciding to apply the per se rule.

For all of these reasons, this Court should conduct the characterization inquiry on the assumption that the NCAA has established all of the justifications it asserts. The lower courts rejected the justifications for a variety of reasons: some they believed to be irrelevant to antitrust, some they thought to be precluded by the assignment of burdens. If this Court agrees with our arguments that the justifications are relevant and that the lower court used the wrong burden, then it should reverse.

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At least five witnesses testified to the same effect from their own experiences (e.g. A. 533-34, 640-41, 644-45, 643-44, 651, 653-54, 656-64, 755; Exhibit 131-B, 82; Exhibit 131-C, 39-44; Tr. 1186). No witness testified to the contrary—although one witness did say that a defensive end majoring in economics once wrote a senior undergraduate thesis concluding that attendance at Illinois State did not diminish when it played its games at times when other games were broadcast (A. 514-16). (The witness did not produce the study or identify the data or methods of analysis used.) In the face of the lopsided evidence, the district court simply concluded that the studies were flawed. Some were old; none had a perfect control group. Having applied to the only evidence a standard more suited to an administrative agency's review of evidence claimed to support the introduction of new drugs than the evaluation of statistical evidence at trials, the court then dismissed this as a subject of concern.

3. The Arrangements Promote On-the-Field Balance, Which Makes College Football More Competitive against Other Entertainments

One reason the Plan and contracts increase competition is that they spread national and regional TV appearances among more teams than would be the case in their absence. The limitation on the number of appearances per team (now six, four of them national, in any two-year period) means that additional teams receive wider exposure. It is undisputed that the extent of television exposure is very important to colleges in recruiting new players and attracting alumni donations. Thus the increase in the number of teams shown on national or regional broadcasts puts the teams on more competitive footing in recruiting new players and financing their programs.

The result is that colleges will be more evenly matched on the playing field, and more games will be close and exciting. The more close and exciting games there are, the more people will watch college football on TV, where it competes with other entertainments. This is the "balance" justification.

The court of appeals called this justification "noneconomic" and dismissed it under the rationale of *Engineers* (Pet. App. 11a). The court said that the justification simply exalts a reduction in competition. We think the court's response reflects a misunderstanding of the argument. The NCAA has never argued that competition should be reduced, or that such a reduction would be beneficial. The argument, rather, is that balance is procompetitive because it increases competition for audiences on TV.

The court of appeals' reaction may stem from the fact that balance would be a preposterous justification for an agreement among true competitors. No one would say that promoting balance between Boeing and Lockheed in the sale of aircraft is an appropriate, procompetitive aim. If a product can be made and sold by a single firm, that firm must compete against others, and the market will decide who wins and loses.

Football, however, entails *both* competition and cooperation. The NCAA is in some respects a single firm, which must coordinate its internal decisions in order to make the best product. Every game has two teams, and the competition on the field must be balanced or the games will not be attractive. Unless there are many, reasonably equal teams available to be matched on TV, the quality of the product furnished to the networks, audience, and advertisers will decline. Competitive, balanced games are the product the NCAA and its members furnish. This is why college football is successful in competition with other forms of entertainment. Without balanced rivalry on the field, output (measured as viewers of games or in any other meaningful way) will decline, as people turn to other sources for entertainment. Balance on the field is procompetitive because it enhances output. Joint action produces balance; teams and colleges cannot do this alone. Cooperation thus increases competition. The increase in competition is why, under the analysis of *Broadcast Music*, a court must apply the Rule of Reason.

The court of appeals asked why teams that compete on the field should not compete to sell games to television as well. It is misleading, though, to focus on playing field rivalry. The playing field rivalry *is the product;* it is not an independent form of competition. Competition on the field is real, but it is not the economic competition protected by antitrust. Games are not like pens or napkins, made by one firm in competition with others. Each game takes two teams; over a season each school plays eleven opponents. Each school must create a schedule of games with comparable opponents. The scheduling entails multiple networks of horizontal cooperation. These horizontal networks produce a product that is sold in economic competition with other forms of entertainment. Cooperation can

improve the product and thus increase competition.[10] Respondents do not make and vend TV games. Games—seasons of games—are made and sold by the collectivity of colleges, by the league.[11] The TV Plan and contracts do not create cooperation; rather they improve preexisting cooperation to make the product more attractive.[12]

4. Cooperation Creates a TV Series and Reduces the Costs of Production, Which Increases Competition

In *Broadcast Music* the Court held two justifications—the creation of a new product of at-the-ready music licenses, and the reduction in the transactions costs of licensing—to be sufficiently procompetitive to call for application of the Rule of Reason. In *Continental T.V.* the Court concluded that a potential reduction in free riding, which increased interbrand competition, also called for application of the Rule of Reason. All three of these justifications apply to the NCAA's arrangements.

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[10] See Carlton & Klamer, *The Need for Coordination Among Firms, With Special Reference to Network Industries*, 50 U. Chi. L. Rev. 446 (1983) (emphasizing the need for careful application of antitrust principles to industries in which some horizontal cooperation is helpful in increasing output).

[11] The few "superpowers" that might emerge in the absence of the NCAA's controls would not produce a menu of games large enough to be attractive. Networks need not just a few competitive teams, but tens of them so that there might be 100 or more balanced games during each season. Skill, even terms, and variety are the foundations for successful competition against other entertainments. Unless the pool of competitive teams is quite large, it will be hard for a station or network to assemble a season-long package with the quality, competitiveness, variety, and traditional rivalries that make for success.

[12] The district court said that the existence of powerhouses showed that the arrangements had failed to produce balance (Pet. App. 98a). This misses our point: television arrangements affect balance at the margin. A reduction from 40 strong teams to 20 or 10 would have a profound effect on the success of college football telecasts against other entertainments.

NCAA football is a television series, promoted by the networks as a series in competition with other entertainment. NCAA football is sold to networks as a package of 28 annual installments (exposures), just as "Dynasty" is sold as a package of 24 installments. The package sale of "Dynasty" makes it possible for a network to promote the series more effectively. If every installment were auctioned off separately, no one would have the right incentive to promote the series, because promotional expenditures of one station would inure to the benefit of others. (This is directly parallel to the free riding on services and advertising recognized in *Continental T.V.*). The package sale also enables the purchaser of "Dynasty" to tailor its content for maximum acceptability to the audience and to maintain a uniform format, again increasing the chance that it will find favor with the audience.

Things are no different for the NCAA series. The package sale of games enables the networks to promote college football, without giving away promotional benefits to other TV stations and colleges that take no part in the promotion but just want a free ride. The package sale enhances the scope of the networks' choice, making it possible to ensure a more consistent quality and to create balance and variety. The networks may choose any game (often not until five or six days before telecasting); they look at each week's performances to pick the games that seem most likely to be exciting. This last-minute selection of exciting games could not easily be arranged in the absence of the NCAA's arrangements, for then games would be sold to TV in advance of the season. The fact that games are held open under the contract also enables the networks to do this last-minute adjusting of schedules with much lower transactions costs, saving resources.

The network games are telecast more widely than local games would be. This could reduce the production cost (expenses of announcers, camera and other personnel) per viewer, if the staffing is held constant. It also could permit the

employment of a larger or better production crew at the same cost per viewer. Either way, network telecasts have lower quality-adjusted costs of production than local telecasts.

For these reasons, the NCAA series has many of the features of the new product justification in *Broadcast Music*: it yields a unique product, different from what any school could create by itself; it permits spur-of-the-moment selection; it reduces the costs of creating the series. All of these are procompetitive justifications.

The court of appeals may well have agreed with this argument. It called the justifications "potentially procompetitive" (Pet. App. 13a). Ordinarily this would be enough to require application of the Rule of Reason. The court of appeals declined even to consider these "potentially procompetitive" justifications, though, because it thought the NCAA's market share so large that on balance the Plan and contracts must be anticompetitive (*id.* at 13a-15a). We discuss at pages 33-36 the relation between market share and competitive justifications. It is enough for now to say that the Tenth Circuit confused per se with Rule of Reason analysis. Its approach of holding justifications irrelevant in light of market power is a bobtailed version of the Rule of Reason, "bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular ... system is an undue competitive restraint." *Broadcast Music, supra,* 441 U. S. at 17 n.27. A court cannot justify ignoring a competitive benefit—as the per se rule requires—just by going halfway through a Rule of Reason analysis. The Tenth Circuit has simply repeated the blunder that led to reversal of the Second Circuit in *Broadcast Music.*

The court of appeals also observed that *Broadcast Music* was different from this case because the horizontal arrangement in *Broadcast Music* allowed composers to sell directly to users of music, while the TV Plan and contracts allow direct sales only under the exception rules (Pet. App. 14a). The district

court took a similar approach (*id.* at 93a). One answer is that colleges can and do sell outside the network TV contracts: there are more exception telecasts than network telecasts. A. 152-56; page 4, *supra*. A second answer is that direct sales would be of concern only if the NCAA dominates a relevant market, as Broadcast Music and ASCAP did. If the NCAA lacks monopoly power, competition from other vendors is sufficient. See Part III, *infra*. The composers' right to sell outside the blanket license in *Broadcast Music* was important only as a source of potential competition. The parties agreed in *Broadcast Music* that CBS would not license music directly so long as it had a blanket license, so that direct licensing would be important only if CBS should drop the blanket license. Here, if the networks drop the NCAA's package deal, each college could sell directly. Here, as in Broadcast Music, the effective choice about whether to buy rights in a package rests with the networks. We return to this in Part IV.

5. The Arrangements Increase Live Attendance

A third procompetitive effect is that the Plan and contracts increase live attendance at games by reducing the conflict between telecasting and live games. If people are interested in football, then the more plentiful the TV offerings, the less likely are these people to attend games. The stay-at-home incentive may be especially powerful when the TV game involves a popular local school.[13] Yet live attendance is the lifeblood of many schools, which rely largely on box office and concession receipts for the support of their football programs. Diversion of fans to TV may undermine college sports at other schools, reducing the effectiveness of competition in the longer run against other kinds of entertainment.

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[13] The district court therefore missed the point when it observed that the NCAA's plan permits as much as nine hours of telecasting on any given Saturday (Pet. App. 69a). The TV Plan and the exception rules are designed to minimize the number of times a telecast of a popular local school's game will empty the stadiums of nearby schools.

The court of appeals conceded that increased attendance is procompetitive as an increase in output. It dismissed the evidence here as too "speculative" (Pet. App. 10a)— principally because the record does not permit a direct comparison between the increase in live attendance fostered by the TV Plan and any reduction in TV audience—but again this confuses the per se inquiry with the Rule of Reason. Once a defendant establishes a competitive benefit, it is necessary to apply the Rule of Reason.

It is far from clear, in any event, that there is any tradeoff between live attendance and TV viewership in the long run. An increase in live attendance helps maintain the aura and excitement created by crowds, which in turn makes football more attractive (as a live rather than studio event) for television viewers, networks, and advertisers. One needs only to think of why TV shows often use canned laughter or other efforts to simulate the presence of an audience in order to appreciate this effect. Thus more live attendance may yield more TV viewership (by new or different viewers) as well. See A. 785; Tr. 768.

The record strongly supports the NCAA's position that telecasts lead to a reduction in live attendance (see notes 8 & 9, *supra*). The gate-enhancement justification also has been used repeatedly by Congress as the basis of legislation for the protection of attendance at high school, college, and professional football. E.g., S. Rep. No. 1087, 87th Cong., 1st Sess. 2 (1961); H. R. Rep. No. 1178, 87th Cong., 1st Sess. 2-3 (1961); S. Rep. No. 93-347, 83d Cong., 1st Sess. 3 (1973); H. R. Rep. No. 93-483, 93d Cong., 1st Sess. 7-8 (1973). It is hardly the sort of thing a court may disregard entirely, as the per se rule requires.

Respondents say (Br. in Opp. 16 n.16) that Congress's actions demonstrate that the NCAA should seek an antitrust exemption rather than defend its conduct under existing law. Respondents misapprehend the purpose for which we cite Congress's decisions. Respondents have maintained through-

out this litigation that as a matter of fact TV controls do not increase live attendance. Congress has found as a matter of fact that TV controls *do* increase live attendance. A court may not properly invoke a per se rule that is based on a factual *assumption* contrary to Congress's express factual findings.

II. AN ANTITRUST DEFENDANT NEED NOT BEAR THE BURDEN OF PERSUADING A COURT THAT ITS ARRANGEMENTS ARE "NECESSARY" TO THE CREATION OF COMPETITIVE BENEFITS

Before adopting the per se approach, the court of appeals surveyed the procompetitive justifications advanced by the NCAA. It applied the per se rule only after discounting these justifications. The court conducted the survey with its thumb on the scale, though: it held that the per se rule applies unless the defendant establishes not only that its conduct is procompetitive in fact but also that the restraints it has chosen are "necessary" to the achievement of these procompetitive results (Pet. App. 11a & n.9, 15a; see also 13a & n.14).[14] The Tenth Circuit applied the per se rule not because the NCAA had failed to advance procompetitive justifications but because it had not convinced the court of their magnitude. (It rejected one, for example, because it was "not unambiguously procompetitive", *id.* at 10a, and it treated others in a similar way).

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[14] Other courts have held consistently that in antitrust litigation the plaintiff has these burdens, which never shift to the defendant. E.g., *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center*, 684 F. 2d 1346, 1352 n.10 (7th Cir. 1982); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 694 F. 2d 1132, 1136 (9th Cir. 1982) (plaintiff "is wrong in its assertion that once it had proved the existence of a vertical restraint on trade . . . the burden shifted to [defendant] to prove the restriction reasonable"); *Graphic Products Distributors, Inc.* v. *Itek Corp.*, 717 F. 2d 1560 (11th Cir. 1983).

A. Proof of Benefits Case by Case is Inconsistent with the Structure of a Per Se Rule

The court of appeals applied the per se rule because, in its view, the NCAA had not done "enough" to justify its arrangements. The court laid down a rule under which a defendant must prove, case by case, that procompetitive justifications actually support the arrangement; if the defendant fails in such proof, the practices become unlawful per se.

This approach obliterates the line between per se and Rule of Reason offenses. In deciding whether to apply per se condemnation to a category of conduct, this Court has always looked to the *logical* power of a claim that the conduct is potentially procompetitive. If logic suggests the possible existence of such benefits, then a court cannot say that the conduct is always or almost always anticompetitive—as it must in order to label the category unlawful per se. *Broadcast Music, supra,* 441 U. S. at 9-10, 19-20; *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 5 (1958).

If logic suggests that some category of conduct may have competitive benefits, it is appropriate to use a Rule of Reason inquiry to search for them. *Broadcast Music, supra; Continental T.V., supra.* The Court applies the Rule of Reason to *all* merger cases, because of the potential benefits of integration; it leaves to Rule of Reason inquiry the detailed assessment of benefit and harm. On the other hand, if logic suggests the implausibility of benefits, it is inappropriate to search, even if by chance benefits exist in a given case. *Maricopa, supra,* 457 U. S. at 342-48.

It might be wise to put an antitrust defendant to the burden of proving justifications (and the necessity of the restraints) if the court first decided that it was dealing with a category of agreements that were always or almost always anticompetitive. The power of the case for condemnation could be overcome only by the most compelling showing. But such a

rationale would have no bearing on this case. The NCAA is not a cartel; the TV Plan and contracts are not naked restraints. The arrangements challenged here have more in common with other sports leagues, with TV producers (such as MTM Productions) that create multiple shows, and with other cooperative ventures, than with the traditional cartel. To say (as the Tenth Circuit did) that the football teams' partial integration by contract is a cartel, and therefore that the defendant must prove the necessity of the contracts, is to beg the central question of the case.

B. No One Can Prove "Necessity," and a Requirement of Such Proof is Equivalent to Absolute Condemnation

Unless a burden allocation scheme is to be other than a mask for automatic condemnation, it must be possible for the defendant to satisfy the obligation. In an antitrust case, no defendant could satisfy the obligation of "proving" the "necessity" of the arrangements. There is too much room for legitimate debate about the effects of any business conduct. When there is room for debate, a requirement of "proof" of "necessity"—another way of stating a "least restrictive alternative" test—is equivalent to automatic condemnation.

No business practice is necessary in the literal sense, and a court can always imagine some "less restrictive" alternative that, in a hypothetical world, achieves "enough" of the benefits without "excessive" costs.[15] The most anyone can say is that a

[15] The court of appeals' only suggestion was that the NCAA might devise some system of pass-over payments for establishing balance among the teams (Pet. App. 21a). It also implied that a television package using nonexclusive rights would be lawful (*id.* at 26a-27a). But these would not work as well as the existing Plan, and they also entail much of the horizontal cooperation that the court thought unlawful per se. Surely the per se rule was not designed for drawing nice distinctions of this sort. Cf. *Broadcast Music, supra*, 441 U. S. at 17 n.27.

restraint is helpful, efficient, cost-reducing, and the like. To require proof of "necessity" is to condemn, period. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation." *Illinois Election Board* v. *Socialist Workers Party*, 440 U. S. 173, 188 (1979) (Blackmun, J., concurring).

It would be hard to prove, even for a firm as tightly integrated as IBM, that the combination of several different computer and office machine businesses under one roof is procompetitive. The benefits of organization, plain enough in gross, are hard to prove up in a courtroom. See R. Bork, *The Antitrust Paradox* 122-29, 133 (1978). It would be harder still to show that any given set of restraints is "necessary" to the achievement of the gains, when many different marketing approaches could be chosen. Other business organizations, such as sports leagues, hospitals, commercial buildings (offices and shopping centers), which could be, and sometimes are, organized without tight corporate ties, almost certainly would fail to meet the court of appeals' test. There is simply no point in having a "test" that no one can satisfy.

C. This Court has Rejected a "Least Restrictive Alternative" Approach to Antitrust Analysis

This Court has rejected "least restrictive alternative" analysis as a method of identifying per se offenses. In *Broadcast Music* the Court applied the Rule of Reason to the blanket license, a substantial amount of horizontal cooperation. It did so because this form of licensing reduced costs and was accompanied by productive integration. On similar reasoning the NCAA is productive integration, which produces a network series to compete against other shows. Perhaps the NCAA's TV Plan is not "necessary," but neither was the blanket license. The court of appeals in *Broadcast Music*, conducting the Rule of Reason analysis on remand, expressly held the blanket license *not* "necessary" to television networks. *CBS* v. *ASCAP*,

620 F. 2d 930, 937-38 (2d Cir. 1980), cert. denied, 450 U. S. 970 (1981) (blanket license not even a restraint because other ways of licensing may be arranged easily).

Similarly, in *Continental T.V.* the Court repudiated an existing per se doctrine and substituted a Rule of Reason analysis, even though it acknowledged that the restraint "was neither the least nor the most restrictive provision" that could have been used. 433 U. S. at 58 n.29. See also the decision on remand, *Continental T.V., supra*, 694 F. 2d at 1138 n.11, expressly rejecting least restrictive alternative analysis. The list of antitrust cases in which this Court has assigned the burden to the plaintiff could be extended indefinitely.[16]

In other parts of the law it is settled that the plaintiff has the burden even when the law creates or shifts a presumption against the defendant. Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e (1976), offers an illustration of such burden shifting. Once the plaintiff makes out a prima facie case, the defendant must articulate proper justifications. Then the burden returns to plaintiff. *Texas Department of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981) (discussing earlier cases); *U. S. Postal Service* v. *Aikens*, 103 S. Ct. 1478 (1983) (reversing a court of appeals for using a burden-shifting analysis after a full trial). Application of a similar analysis in antitrust would mean that the NCAA bears no greater burden than the one of introducing evidence and articulating justifications.[17] See also Fed. R. Evid. 301. The NCAA discharged this obligation.

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[16] E.g., *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 622 (1977), holding that even in a tie-in case, within the per se category, the plaintiff has the burden of proving the defendant's market power and negating the possibility that a given tie is harmless because the increase in the price of one component of the package is offset by a reduction in the price of the other.

[17] At least one court of appeals has applied the Title VII approach, in modified form, to antitrust. See *Graphic Products Distributors, Inc.* v. *Itek Corp., supra*, 717 F. 2d at 1573 (plaintiff must

(*Footnote continued on following page.*)

D. The Burden Question Affects the Whole Case

If the Court agrees with this submission on the allocation of burdens, it should reverse the entire judgment, not just disapprove the portion of the reasoning that rested on the per se rule. The district court's findings of fact do not distinguish between the per se and Rule of Reason inquiries. All of that court's conclusions apparently were based on the assumption that plaintiffs had no burden, while the NCAA was required to prove the benefits of its arrangements. See notes 8 & 9, *supra*.

The court of appeals was more careful in stating (Pet. App. 11a & n.9, 15a) that it applied a special burden only to the per se aspect of the case. Nonetheless, the Tenth Circuit's decision rested on the district court's findings, which were themselves thoroughly influenced by the mistaken allocation of burdens. The NCAA argued that many findings were clearly erroneous. Because of its assumptions on the location and magnitude of the burden, the court of appeals never addressed these contentions. The court needs to revisit them using the correct burden.

It is also difficult to resist the conclusion that the Tenth Circuit imposed the burden on the NCAA throughout the case, no matter what it said it was doing. The Rule of Reason portions of the opinion (Pet. App. 15a-22a) consist of little more than a reassertion of each of its adverse conclusions from the per se sections. The court did not distinguish in any respect according to any difference in the burden. It is therefore appropriate to vacate the Rule of Reason portion of the

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(Footnote continued from preceding page.)

show the defendant's market power and the existence of anticompetitive effects; defendant then is free to establish that, "notwithstanding its market power, the vertical restraints were reasonably necessary to achieve legitimate, pro-competitive purposes"). (In context, "reasonably necessary" is a much weaker test than the Tenth Circuit's "necessity" test; we read "reasonably necessary" in *Graphic Products* as equivalent to "helpful" or "beneficial.")

judgment along with the per se portion and to remand the case with instructions to the court of appeals to evaluate all of the findings of fact under the correct burden. See, e.g., *U.S. Postal Service* v. *Aikens, supra,* among many cases handling judgments in this fashion.[18]

III. THE NCAA DOES NOT POSSESS MARKET POWER

The cornerstone of the court of appeals' Rule of Reason holding is its conclusion that there is a market in college football televised live on Saturday afternoons in the fall. The NCAA's members have a high share of this market, from which the court of appeals inferred market power. The market power in turn made the restraints unreasonable. The definition of the market rested on essentially two propositions: (1) for many viewers, there is no substitute for college football and thus networks must show college football, and (2) advertisers pay more, per viewer, to reach these viewers than they pay for television viewers on average. Although we do not dispute these findings by the lower courts, we submit that the inference of market power does not follow.

A. The Existence of Market Power is Important for the Per Se Inquiry as well as Rule of Reason Analysis

Market power affects both the Rule of Reason and the per se holdings. The relation between Rule of Reason and market power is plain: unless the NCAA has market power, its arrangements cannot have an adverse effect on prices or output

[18] The difference between per se and Rule of Reason liability also affects the scope of relief, and this provides an additional reason for remand. A per se holding dooms all "exclusive" contracts (and maybe, if respondents are right, all other methods by which the NCAA may package sports TV rights). See Pet. App. 135a-136a. A properly drawn decree based on a Rule of Reason holding, though, would do no more than strike down the existing Plan and contracts, leaving new arrangements to new litigation on a new record.

and thus cannot violate the Rule of Reason. A finding of no market power is dispositive in the NCAA's favor.[19]

The relation between market power and the per se holding is more subtle. Whether a practice may be justified as useful in competing against other economic units depends on whether there is such competition. In other words, the appropriate characterization of a practice as competitive (subject to Rule of Reason) or monopolistic must start from an assessment of its utility as part of a process of rivalry.

Consider the Tenth Circuit's treatment of the argument that the TV Plan and contracts defined and improved a TV series, the better to compete against other entertainment (pages 22-25, *supra*). The Court refused even to consider this justification because, in its view, the inability of the NCAA's members to sell directly to TV networks, outside the series contract, presented unacceptable risks of cartelization (Pet. App. 12a-14a). Such risks are present, though, only if the NCAA's members are so large in relation to the market that the withholding of games affects prices. If the NCAA is small in relation to the market, its activities in packaging a competitive series are consistent with antitrust aims. The characterization analysis required by *Broadcast Music* thus must start (although it cannot end, as that case shows) with an assessment of market power.

The relation between market power and the legality of horizontal cooperation is well established in the law of mergers. Acquisitions that are small compared with the market, or otherwise entail no substantial increase in market power, are

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[19] E.g., *Cowley* v. *Braden Indus., Inc.*, 613 F. 2d 751, 755 (9th Cir. 1980); *Muenster Butane, Inc.* v. *Stewart Co.*, 651 F. 2d 292, 298 (5th Cir. 1981); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F. 2d 742, 745 (7th Cir. 1982) (Posner, J.); *Products Liability Ins. Agency, Inc.* v. *Crum & Forster Ins. Cos.*, 682 F. 2d 660, 663-65 (7th Cir. 1982) (Posner, J.); *Graphic Products Distributors, Inc.*, *supra*, 717 F. 2d at 1568-71 (collecting authorities).

lawful because of the potential benefits that flow from cooperative production of goods and services. Joint ventures also are easier to sustain when they do not create or exploit market power.

The same approach should apply to partial integration by contract, the subject of this case.[20] It would make no sense to hold unlawful per se an agreement among members of the Big Eight Conference to establish a "Big Eight Game of the Week" in basketball. The Big Eight has such an arrangement, under which members sell the games as a package to a single network, split the television appearances and rights fees equally, and agree not to show games in competition with those selected for telecasting in the series. The Big Eight series faces ample competition from other entertainment, and the series package may well be the most effective form of competition against these rivals. Almost every successful professional sport has pooled and sold TV rights as a package to one or more networks, assuring the purchaser of a degree of exclusivity to enable it to promote the series.[21] Yet the Tenth Circuit's approach to the per se analysis would condemn the Big Eight's and the other leagues' arrangements because horizontal rivals

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[20] We do not doubt, on the other hand, that the per se rule applies to naked restraints, no matter how small the market shares of the participants. E.g., *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) (agreement among beer wholesalers in Fresno, California, held unlawful per se); *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 309-10 (1956); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221 (1940).

[21] Professional football, baseball, basketball, and hockey have a statutory antitrust exemption for telecasting agreements, 15 U.S.C. § 1291 (1976), but this applies only if certain conditions are satisfied, and it does not pertain to other professional sports or any amateur sports. The exemption does not expressly cover sharing of revenues or cable arrangements, and some forms of pooling of rights are not covered.

(the colleges and universities) cooperated in a way that reduced the number of different games shown.[22]

B. Market Definition is a Way of Assessing Market Power

The antitrust laws are designed to root out anticompetitive practices, those that threaten consumers' welfare and economic efficiency. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 343 (1979). No cooperative production can threaten competition and consumers' welfare unless those who participate possess market power—that is, "the power to control prices or exclude competition." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U. S. 377, 391 (1956). The ideal way to assess market power is to measure it directly. If we know whether a firm (or association) possesses the power to raise prices significantly above the competitive level without losing so much business that it is forced to rescind the increase, we know whether it has the market power with which antitrust is concerned.

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[22] An agreement among professional golfers to telecast selected tournaments and not others as part of a PGA series also would be unlawful per se if market power is to be disregarded. An agreement among a city's sports teams to form a telecasting service for their games could not easily be sustained. The Chicago White Sox (baseball), Bulls (basketball), Sting (soccer), and Black Hawks (hockey) have formed SportsVision, a pay TV service that carries their games. Although SportsVision broadcasts more games than had previously been carried on free TV, the number of free TV games is down, as the teams have agreed not to telecast games in competition with SportsVision. This could be characterized as an illegal reduction of output under the Tenth Circuit's approach. A similar arrangement in Minneapolis between the Minnesota Twins (baseball) and Minneapolis North Stars (hockey) has been challenged by a television station that bid unsuccessfully for a contract to carry the games. *Midwest Communications, Inc.* v. *Minnesota Twins, Inc.*, Civ. 3-82-1729 (D. Minn. Sept. 13, 1983) (holding arrangement unlawful as a tie-in).

When it is not possible to assess market power directly, it is necessary to define a market and to ascertain the parties' shares of that market. A substantial share is a basis for inferring market power. Because the market definition—market share approach is just a *proxy* for what we really want to know, however, the market definition inquiry must be carried on with sensitivity to the underlying concern for power over price.[23] So, for example, in *United States* v. *General Dynamics Co.*, 415 U.S. 486 (1974), the Court defined the market as uncommitted reserves of coal available for sale in the future. This future-oriented definition more accurately reflected power over price than did a definition looking at current sales, most of which occurred under existing contracts that had been negotiated beforehand and could no longer be influenced by a merger. In *Du Pont* the Court defined the market as flexible wrappings rather than just cellophane, because the price of cellophane was constrained by the availability of other wrappings. The list of similar cases is quite lengthy, but there is little need for extended citation.

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[23] See, e.g., II P. Areeda & D. Turner, *Antitrust Law* ¶ 500, 517-28 (1978) (pointing out that markets are defined to assess power, and in ¶500 that because of the status of market definition as a proxy for power, "market definition may not be necessary for proof of market power; may not be sufficient, as such, to establish market power; and may be redundant or misleading once the facts necessary to accurate definition have been obtained"); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 962-63 (1981) (showing how market definition is a proxy for market power). The 1982 Department of Justice Merger Guidelines, 2 Trade Reg. Rep. ¶4502, also recognize that markets are defined to measure power and that the definition should be crafted in light of this concern.

C. The NCAA Lacks Power Because Advertisers Can Switch

Both the district court and the court of appeals defined a market of college football television programming on Saturday afternoons in the fall because college football is unique. Nothing is quite like it. It has devoted fans. The colleges are unlikely to move games to Sundays because of competition from professional football, which is much more popular. Of programming on Saturday afternoons in the fall, only the baseball playoffs and the World Series are as attractive to viewers or advertisers. Advertisers pay a pretty penny to reach the viewers. We do not dispute these factual premises. The conclusion that they define a market does not follow, however, because none of these things indicates market power.

The most important fact about the sale of televised college football is that viewers do not buy the product. The transaction is more complex. Football attracts viewers; advertisers who buy time on the programs pay the networks according to the number and demographic characteristics of people who watch; networks then pay the NCAA and its members according to how much they collect from advertisers (or, in the case of long term contracts, how much they anticipate collecting). The advertisers are indifferent to the reason why viewers watch; they play off different sources of programming against one another to get the best price per viewer. The fact that some viewers may be addicted to college football—would be willing to pay two or three times as much, were they paying anything— does not matter, when the viewers aren't doing the paying. There is simply no way in which the NCAA, by cutting back the output of games, can induce advertisers to part with an extra nickel. We return to this below.

The court of appeals' approach to market power focuses on what the colleges have to sell rather than on what people buy.[24] Under this approach almost any differentiated product is a market unto itself. Mercedes cars cost more than other cars, on average, and many customers are so enamored of them that for those customers Chevrolets are not good substitutes. IBM computers cost more, on average, than other computers, and many customers want an IBM machine even at a premium. One would conclude on such an analysis that Mercedes cars and IBM computers are markets, which Mercedes and IBM monopolize.

This Court rejected analysis of this sort in *Du Pont*, holding that even a product as distinctive as cellophane is not a separate market if many customers find other products to be substitutes. The existence of some customers (cigarette manufacturers) for which only cellophane would do did not define a market. See also *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964) (bottles and cans are in a single market, even though produced by different machines, because users can and do substitute between the two). Many other courts, following this approach, have held that distinctive products and committed

[24] The district court was more explicit than the Tenth Circuit, stating that it would disregard the role of advertisers in the viewership market because "the focus on this inquiry must be guided by the nature of the specific antitrust injury alleged by the plaintiffs. The plaintiffs' concerns have little to do with which particular advertisers choose to buy commercial time on college football telecasts. . . . The activity which produces injury to the plaintiffs is the NCAA's sale to a particular broadcaster or cablecaster of an exclusive right to televise college football games. That being the source of the injury, the Court's analysis must focus on that transaction. By focusing on that transaction, it becomes clear that college football television is a distinct market" (Pet. App. 73a-74a). This approach has nothing to do with power over price, yet the court of appeals endorsed the market definition so found.

customers do not identify a market.[25] In a case with many features in common with this one, a court held that pay television furnished to apartments was not a market—even though the product is unique and the customers cannot switch—because competitive conditions prevented the defendant from elevating prices for its services. *Satellite Television & Associated Resources, Inc.* v. *Continental Cablevision of Virginia, Inc.*, 714 F. 2d 351, 356 (4th Cir. 1983). Similarly, the appropriate inquiry here is whether the NCAA can elevate prices by reducing the number of different games to be telecast. To answer that question, we must return to the situation on the real buyers: the advertisers.

D. Undisputed Data Establish the Absence of Power over Price

The NCAA's power over price is constrained by the ability of viewers to switch to other entertainments on TV, and more importantly by the ability of advertisers to switch to other TV programs and advertising media if the NCAA tries to raise the price. The fact that for some viewers, perhaps even some advertisers, at some times, only football will do, does not give the NCAA power, any more than the fact that some people can shop for groceries only on Saturday afternoons gives a supermarket power. Those who can (and do) switch will prevent

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[25] E.g., *Calnetics Corp.* v. *Volkswagen of America*, 532 F. 2d 674, 691 (9th Cir.), cert. denied, 429 U. S. 940 (1976); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F. 2d 256, 277-83 (5th Cir. 1978), cert. denied, 440 U. S. 939 (1979); *Kaplan* v. *Burroughs Corp.*, 611 F. 2d 286, 293-95 (9th Cir. 1979), cert. denied, 447 U. S. 924 (1980); *Telex Corp.* v. *IBM Corp.*, 510 F. 2d 894 (10th Cir.), cert. dismissed, 423 U. S. 802 (1975) (peripherals plug-compatible with IBM computers are not a market because IBM computers are not a market); *Reisner* v. *General Motors Corp.*, 511 F. Supp. 1167 (S. D. N. Y. 1981), aff'd on other grounds, 671 F. 2d 91 (2d Cir. 1982); *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801 (N. D. Cal. 1981).

sellers from raising price. If the NCAA tried to raise price, advertisers would switch to other shows or other media.[26]

NCAA football is a trivial fraction of all TV programming (the district court computed it at 0.005%, see Pet. App. 120a), and even if there is something special about sports in general the NCAA's fraction is small (about 7-14% of all fall sports, see A. 174-77). Thus the NCAA has no power over advertisers.[27]

Of course, this statement of the nature of the constraint leaves the question of power unanswered. Perhaps, if NCAA football really attracts some especially good audience—which in the broadcast business means a homogeneous audience, permitting advertisers to target their pitches to select groups—the NCAA would have market power because of the limited number of programs that can create such collections of viewers. It is therefore appropriate to look at available evidence.

The hypothesis that there is something special about the NCAA's viewers that enables it to increase price implies that college football is uniquely attractive to certain advertisers. One can test this by looking for such advertisers. This was done, and the data refute the captive advertiser hypothesis. Even the heaviest advertisers on NCAA football put about 95% of their network ads on other programs, establishing that these advertisers have many substitutes (A. 167-74, 182-94; see also

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[26] Testimony in the record establishes that those who participate in television markets view advertisers as the real buyers (A. 772-74, 777). An economic analysis of the broadcast market appears in the report of Dr. William M. Landes, who appeared as an economic expert (A. 158-177).

[27] Indeed, the NCAA's share is not large even if measured from the viewers' perspective in a "Saturday afternoon market." Of all television sets in the U.S., only about 12% tune in to NCAA telecasts; of all sets tuned on on Saturday afternoons, only about 33% are tuned to the NCAA. A. 236-40, 254-55, 781. This is not a large share, even on an incredibly narrow definition.

Pet. App. 119a, crediting the evidence). This holds true whether the inquiry is advertiser-by-advertiser or product-by-product. There are *no* advertisers capable of being exploited by the NCAA.[28]

The court of appeals bypassed this fact, apparently because it believed that the high price paid per viewer, and per game, demonstrates the NCAA's possession of market power (Pet. App. 18a-19a). The court observed that in 1980 a 30-second spot on NCAA football cost $47,900, while a 30-second spot on baseball cost $17,100. *Ibid.* Although we do not dispute the facts emphasized by the court, we submit that the court's inference of market power is simply illogical. The court neglected the relation between output (number of viewers) and the price of ads.

In a perfectly competitive market, the price paid for an advertising spot will depend on two things: the number of people who watch any given show, and the demographic characteristics of those people (A. 158-61). A show that attracts 20 million people will be able to charge roughly twice what a show that attracts 10 million charges; a show appealing

[28] The district court pointed out (Pet. App. 119a-120a) that the heaviest advertisers on college football put 5% of their ads on what amounts to 0.005% of all available programming. It inferred market power from the disproportion. This is an unsupportable inference. No matter what the disproportion, the fact remains that the NCAA gets only 5% of the network business of the advertisers who most want to reach audiences with demographic characteristics like the NCAA's audiences. As a matter of law, a five percent share is too small to support an inference of market power. E.g., *Fortner II, supra; Dimmitt Agri Indus., Inc.* v. *CPC International Inc.*, 679 F. 2d 516 (5th Cir. 1982), cert. denied, 103 S. Ct. 1770 (1983) (25% share insufficient as a matter of law); *Kingsport Motors, Inc.* v. *Chrysler Motors Corp.*, 644 F. 2d 566, 571 (6th Cir. 1981) (firm with at least a 10% share of the concentrated mid-sized car market lacks market power); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) (33% certainly too small).

to higher-income viewers can charge more, because such viewers buy more in response to the ads. The existence of a higher price for the 20-million-viewer show does not establish monopoly. Quite the contrary, it means that the producer of the 20-million-viewer show has found a way to attract a larger audience. This is an increase in output; fostering such increases is the goal of antitrust. Similarly, a producer who figures out how to attract a "better" audience has increased output. The only sound basis for an inference of market power would be a finding that advertisers paid more per viewer, after adjusting for the demographic characteristics of the viewers, on NCAA football.

The court of appeals did not say that advertisers pay more per viewer for NCAA football than they do for viewers of other shows, once the demographic characteristics of the viewers are accounted for. No evidence in the record would support such a conclusion. The evidence just shows that many people watch the NCAA's games, and that these viewers have desirable demographic characteristics. No evidence in the record supports an inference that the NCAA's viewers have unique characteristics unavailable to advertisers on other programs. Many prime time TV shows and other sports events attract much higher advertiser payments per viewer than NCAA football.[29] Apparently many shows yield audiences more attractive to advertisers than the NCAA's. The court of appeals did not say that the networks or advertisers pay more per game

[29] Nielsen data show that in 1980 advertisers paid $4.81 per thousand viewers for 30-second NCAA spots. In the same period advertisers paid $5.05 for professional basketball spots, $5.41 for golf spots, $5.60 for pro football spots, and $7.37 for horse racing spots. Nielsen Television Index, *Sports 1980*, at 65-68 (1981). Prime time shows attracted even higher payments. In July 1983 the price per thousand viewers for 30-second spots on dramas ranged from $4.61 for "Remington Steele" to $11.12 for "Dynasty." The price for adventure series ran from $4.24 for "Knight Rider" to $7.40 for "The Fall Guy." Nielsen Television Index, *NAC Cost Supplement* (July 1983).

than is warranted by the number of people who watch and the amount of advertising sold. Thus the fact that NCAA football brings handsome prices reflects only that NCAA football is attractive to millions of viewers.

Instead of showing market power, this proves our point. The TV Plan and contracts have created popular entertainment, watched by millions. Output (viewers and advertising) is up, not down. The popularity of the games depends in part on the controls at issue in this case, controls that create competitiveness on the field and competition with other products. The court of appeals' observation that the games attract many viewers that advertisers want to reach is a tribute to the procompetitive, output-expanding aspects of the arrangements. It is deeply ironic that the court of appeals should turn the success of the NCAA's plan into a reason for antitrust condemnation.

The district court relied on one more bit of evidence to support its conclusion that the NCAA possesses market power. The court said that the very large increase in the price paid per exposure in the 1982-85 contract establishes power (Pet. App. 77a, 118a-119a, 121a-123a). The court of appeals did not rely on this approach, and for good reason. The premise is untrue, and even if the premise were true the conclusion would not follow. The district court was led astray by looking at nominal dollars, always a mistake in a time of inflation. If one computes all payments in currency of constant value, it turns out that real prices have changed very little over the last 20 years. The price per exposure, measured in 1970 dollars, was $582,300 in 1964 and $576,000 in 1981 (A. 164-66 [Tables are expressed in index numbers which have these values.]; 690-93, 735-37). True, it rose to $853,100 in 1982, but this amounted to catching up on inflation. The price had been $750,500 in 1978, and inflation eroded that price.[30]

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[30] Because the NCAA has entered into a series of multi-year contracts, the payments in the first year (computed in new dollars) *always* show an increase over the payments in the last year of the old contract. Taking an average over the life of the contracts, as Dr. Landes did in the cited portion of his report, and expressing the average in constant dollars, establishes the parity.

It is far better to look at the real price per 1,000 viewers as a measure of price changes over time. This price has not fluctuated much. It was $2.91 in 1974, $2.61 in 1977, and $2.88 in 1980 (A. 163, 236-40, Tr. 1012). It is more important still to observe that the price per advertising spot has remained constant as the number of minutes available on NCAA games has expanded. In competition, no producer's decisions about the size of its own output can affect price by very much; producers are price-takers in competitive markets. When monopolists change the amount of their production, by contrast, they can affect price significantly. The evidence showing that the NCAA is a price-taker very strongly suggests, and perhaps it even proves, that the NCAA lacks power.[31]

At all events, a finding that the price has increased in the latest contract does not support a conclusion of market power. If the NCAA has market power, it has had that power essentially unchanged since 1952. During the interval, it has contracted for telecasting of ever more games. As a firm with market power expands production, price falls; this is a simple application of the law of downward-sloping demand recognized in this Court's cases.[32] The greater the output, the lower

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[31] In a similar vein is undisputed evidence showing that the price of ads on NCAA telecasts has tracked the price of ads on other shows over a long time. Each rises (or falls) with the other. See A. 161-66. The joint movement of prices is a standard signal that two things are in the same market because it shows substitution, as the 1982 Guidelines recognize. See 2 Trade Reg. Rep. ¶ 4502.10(3). (An illustration: if prices of ball point pens and mechanical pencils always move at the same time by the same amount in the same direction, we know consumers are freely substituting between them and they are in the same market, although the facilities for making the two items differ.) Neither of the lower courts mentioned this method of proving the scope of the market.

[32] E.g., *Broadcast Music, supra*, 441 U.S. at 19-20; *Catalano, supra*, 446 U. S. at 648-49 (recognizing the converse of the law: that reduced output and the ensuing higher prices bring new entry). See also Areeda & Turner, *supra*, at ¶ ¶ 402-405 (economics of market power, showing inverse relation between price and output); R. Bork,

(Footnote continued on following page.)

the price. Because the increase in 1982-85 cannot depend on either a new reduction in output or a new agreement in restraint of trade, it must be understood as the result of competition. The NCAA's members collect more money because more games—and more viewers per game—are increases in output. Once the appropriate inferences are drawn from the available evidence, the conclusion that the NCAA lacks market power becomes compelling.

IV. THE TV PLAN AND CONTRACTS PROMOTE RATHER THAN SUPPRESS COMPETITION: THAT THE COMPETITION IS OVER THE SERIES CONTRACT RATHER THAN EACH GAME IS NOT A REASON FOR CONDEMNATION

Underlying most of the court of appeals' reasoning is a conviction that the NCAA's contracts with the networks reduce competition and output because, once the contracts have been signed, the teams and TV stations do not *thereafter* compete, game by game, for telecast rights. E.g., Pet. App. 7a n.5, 14a, 16a-17a, 21a-22a. The court of appeals also objected to the "vertical foreclosure" created by the contracts: they exclude some stations and networks from showing some games, and they supposedly give an advantage to the larger buyers. *Id.* at 4a, 14a-17a. In other words, the court used as a model of competition the existence of a game by game spot market in telecasting rights.

(Footnote continued from preceding page)

The Antitrust Paradox 90-115 (1978) (same); R. Posner, *Antitrust Law: An Economic Perspective* 8-18, 237-55 (1976) (same); F.M. Scherer, *Industrial Market Structure and Economic Performance* 9-44 (2d ed. 1980) (same); Landes report (A. 132-51) (same). The district court's statement that "[o]nce a firm has achieved a monopoly position in an industry, reduced output and raised prices, it maintains its monopoly price by marginally increasing output and prices" (Pet. App. 118a)—a statement that is the foundation for its economic analysis—reflects the most profound ignorance of antitrust economics.

This part of the Tenth Circuit's approach reflects a confusion about the nature of "competition" in antitrust. There is no antitrust reason why competition must take the form of a game-by-game market rather than competition for series contracts. This Court and the courts of appeals have recognized many times that such competition can be as powerful as spot competition in increasing output and improving consumers' welfare.[33] Competition for the contract often is particularly effective because it focuses the efforts of both buyers and sellers on a single, intense round of bidding; the greater stakes of a bulk sale or purchase make the competition that much more intense. The Tenth Circuit's view is the opposite: the use of long term or bulk contracts is a reduction in competition.

In this case there was extensive competition for the network contracts. NBC, ESPN, USA Cable, and many smaller networks competed, while ABC, CBS, and Turner were successful. In light of the nature and vigor of this competition, it is unsupportable for the court of appeals to conclude, as it did, that these very contracts reduce output and increase the price paid for games on TV (Pet. App. 16a-17a, 21a-22a). If the Plan and contracts were the tools of a monopolist, one would

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[33] *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974); *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 623-25 & n.24 (1974); *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119, 126-27 (7th Cir. 1982).

Respondents dismiss these cases as irrelevant (Br. in Opp. 30 n.32), largely on the ground that one is about coal, another about bubble gum cards, and so on. We do not cite them, however, for the industries concerned. The point is that each case recognizes how the process of negotiating for a long-term contract is a form of competition, rather than a reduction in competition. Similar arguments about the nature of competition have been made by petitioner and the United States as *amicus curiae* in *Jefferson Parish Hospital District No. 2* v. *Hyde*, *supra*.

expect to see ABC, CBS, Turner, and the advertisers as the plaintiffs. On the court of appeals' theory, they pay the overcharge, while respondents are the beneficiaries. Yet ABC appeared as *amicus curiae* to defend the contracts, while CBS and Turner supported the NCAA's request for a stay in the Tenth Circuit. No advertiser has expressed the slightest concern.

The curious litigating posture of the parties in this case—with the supposed recipients of monopoly profits as the plaintiffs, and the supposed victims (the networks) defending the arrangements—suggests that there is a fundamental flaw in the court of appeals' logic.[34] The Court thought competition suppressed; in fact there is more competition. By spreading national and regional TV appearances among more teams, the arrangements promote competitive balance (i.e., help out respondents' rivals); they increase viewership on TV and live attendance at the stadiums of other universities. They produce the efficiencies associated with the packaging of other television series and enable the networks to compete more effectively against other entertainments. They enable TV stations to deliver football at a lower cost per viewer then alternative production arrangements.

Thus even if the NCAA has market power, the TV Plan and contracts are not unreasonable restraints of trade. They expand rather than reduce output. The contracts aid viewers,

[34] There are some curious things in the positions of the courts below as well as in the positions of the parties. The district court and the court of appeals repeatedly condemned the arrangements as monopolistic (price-increasing) reductions in output. The district court also called the arrangements monopsonistic reductions in price (e.g., Pet. App. 62a-74a, 107a-108a). It cannot be both things at once. The colleges get practically the whole price paid by the networks (the NCAA's central organization retains less than 7%). Thus colleges either get more or less; the Plan cannot simultaneously monopolize as the networks see things and monopsonize as the colleges see things.

who watch more football overall but do not watch the same games respondents want to telecast. They also aid the colleges. Like any other form of successful competition, they yield greater output, lower costs, and higher profits. The Plan and contracts make a larger pie, for viewers and universities alike. The profits here signal competitive benefits, not monopoly. True, respondents are not receiving slices as large as they wish, but the antitrust laws do not protect the pocketbooks of individual competitors at the expense of consumers. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 487-89 (1977).

In this market, competition for the contract helps consumers more than spot market competition would. The buyers compete vigorously, and in order to sell contracts to the networks the NCAA must design a set of rules that offers viewers and advertisers what they want. Buyers have so many other options that the competitive contracting process is bound to increase output, to the benefit of all. The antitrust laws do not prefer spot market competition; still less is competition for the contract "unreasonable." Only by narrowing the "market" to the NCAA's product (rather than sports or entertainment on TV), and overlooking how the bidding process occurs, did the court of appeals characterize this output-expanding arrangement as an unlawful restraint of trade. The Plan and contracts pass muster under the Rule of Reason.

CONCLUSION

The judgment of the court of appeals should be reversed.

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December 1, 1983